[redacted]

Supreme Court of the United States

October Term, 1968

No. 1379

UNITED STATES OF AMERICA, Petitioner

v.

IDEAL BASIC INDUSTRIES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the District of Wyoming (R. 64-77)[1] are reported at 263 F. Supp. 594.

QUESTIONS PRESENTED

This case involves the determination of the allowable depletion deduction to respondent, a producer of portland cement, for the taxable years 1951 through 1954.[2] The de-

[1]"R." references are to the Appendix in the Court of Appeals. "Pet." refers to the government's Petition for a Writ of Certiorari. "Pet. App." refers to Appendices to the Petition.

[2]Applicable statutes: 1951-53, §§ 23(m) and 114(b), Internal Revenue Code of 1939; 1954, §§ 611 and 613, Internal Revenue Code of 1954.

duction is based in turn on respondent's "gross income from mining" at the "kiln feed" cutoff point.[3] The parties are agreed that there is no representative market or field price for kiln feed since it is not sold in commerce, and, therefore, respondent's gross income from mining should be computed under the proportionate profits method by deriving constructively such gross income from the representative market or field price of respondent's first marketable product.

Thus, there is no dispute as to the applicable statutes nor the technique to be employed in arriving at the measure of respondent's depletable income. The questions presented here are limited solely to applying the proportionate profits method in computing respondent's gross income from mining and to factual and accounting problems as to the proper allocation of certain costs and expenses incurred by the respondent in its business.

1. Did the court below properly determine that the gross income from mining should be determined by allocating to mining a part of respondent's gross income from its first marketable product, bulk cement, in the proportion which the costs incurred to produce kiln feed bears to the costs incurred to produce bulk cement?[4]

2. Did the court below properly determine that respondent's first marketable product was bulk cement, or should the court have held that the respondent's first marketable product included cement placed in bags which was sold at a higher price.

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[3]Respondent elected to compute its gross income from mining at the kiln feed cutoff point pursuant to § 4 of the Act of September 14, 1960 (P. L. 86-781, 74 Stat. 1017).

[4]As petitioner concedes (Pet. p. 6), the decision of the Court of Appeals below reached essentially the same "arithmetic result" as that of the District Court.

3. Did the court below properly affirm the trial court's finding of fact that the grinding and blending of relatively insignificant quantities of purchased pre-kiln additives was incidental to the grinding and blending of respondent's mined minerals.

SUMMARY

From the above, it should be observed that the questions presented on which the government seeks review by this Court are essentially factual problems in the allocation of various costs and expenses incurred by this particular taxpayer in the production, marketing and distribution of cement.

STATUTES AND REGULATIONS INVOLVED

The petitioner is in error in stating that Regulations § 1.613-3(d) are applicable to the year 1954 (Pet. pp. 5 and 13). The 1939 Code regulations prescribing the proportionate profits method (Pet. App. p. 15a) were specifically continued in effect under the 1954 Code until superseded by new regulations.[5] The 1954 Code regulations relied on by the government (Pet. App. pp. 16a-20a) differ in many material respects from the 1939 Code regulations. The 1954 Code regulations were not adopted until July 25, 1968, long after this case was tried, and in fact, many years after this case was first in controversy. Petitioner correctly states that it was undisputed between the parties at trial that respondent's gross income from mining should be determined under the proportionate profits method (Pet. p. 4). However, the proportionate profits method agreed upon by the parties was that set out in the regulations in effect at the time of trial, i.e. the 1939 Code regulations, and not the different method described in the regulations adopted in 1968.

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[5] § 7807(a), 1954 Code; T.D. 6091 (C.B. 1954-2, 47).

REASONS WHY THE WRIT SHOULD BE DENIED

1. *The Ruling Below Is Not A Matter of General Importance in the Administration of Federal Revenue Laws.*

Respondent is an integrated miner-manufacturer engaged, in the taxable years in question, solely in the production of portland cement. Respondent's nonproducing costs are incurred only with respect to the continuous series of processes beginning at the mine and ending with the production of the first marketable product, bulk cement. Therefore, the nonproducing costs involved here are different in kind from those incurred by other taxpayers who do not exclusively sell one mined-manufactured product such as portland cement and who might be required to allocate such costs among several products.

The technique of applying the proportionate profits method concerns itself essentially with the determination of the factual relationships between the various processes and activities involved in the production and distribution of the first marketable product. The court below was only concerned with the application of the proportionate profits method in the case of this taxpayer, a single product producer of cement, *(Ideal,* 404 F.2d at p. 125) and did not purport to lay down principles of general application to producers in other industries. There is a drastic diversity in the allocation problems that arise when the proportionate profits method is applied in different industries and to multi-product producers. This case does not present an appropriate occasion for this Court to promulgate meaningful broad standards that can govern the varied factual determinations by lower courts that arise at different contexts each with its own peculiar considerations.

2. *There Is No Conflict on Important Questions of Law Among the Appellate Courts.*

The rulings below do not conflict with the appellate

decisions relied on by petitioner. All of the appellate courts recognize that the objective is to determine a hypothetical gross income from the hypothetical sale of kiln feed for the purpose of computing an integrated miner-manufacturer's gross income from mining (*Standard Lime & Cement Company v. United States,* 329 F.2d 939, 946 (Ct. Cl. 1964); *Whitehall Cement Manufacturing Company v. United States,* 369 F.2d 468, 471 (3d Cir. 1966); *United States v. Ideal Basic Industries, Inc.,* 404 F.2d 122, 125 (10th Cir. 1968); *Riddell v. California Portland Cement Company,* 330 F.2d 16, 17 (9th Cir. 1964)). All courts agree that this determination is to be made by application of the proportionate profits method as described in Treas. Reg. 118,[6] § 39.23(m)-1(e)(3) made applicable to taxable years under the 1954 Code by T.D. 6091 (C.B. 1954-2, 47) (*Standard Lime, supra,* at p. 941, n. 3; *Whitehall Cement, supra,* at p. 471; *United States v. Portland Cement Co. of Utah,* 378 F.2d 91, 93 (10th Cir. 1968); *Ideal Basic Industries, Inc., supra,* at p. 125; *California Portland, supra,* at p. 17).

In essence the courts are in agreement as to the objective and the legal principles governing the determination of the questions presented. It is hardly appropriate for this Court to become involved in the details of the computation where the appellate courts are in agreement as to the objective to be achieved and the technique to be used.

It is not disputed that the starting point of the proportionate profits computation is the representative market or field price of the first marketable product. It is simple logic, as the court below stated (404 F.2d at 126), that bulk cement is the first marketable product because it is marketed and is the first point in the overall production

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[6]Promulgated under the 1939 Code.

process where gross income from a product actually sold is available.

In defining gross income from mining, § 613(c)(2) of the 1954 Code provides that mining includes the treatment processes *"necessary and incidental"* to the extraction of minerals and the treatment processes specifically defined as mining.[7] The court below merely affirmed the trial court's finding that the grinding and blending of relatively insignificant quantities of purchased pre-kiln additives was incidental to the grinding and blending of respondent's mined materials. Contrary to the strained argument in the Petition (Pet. p. 14), the Ninth Circuit in *Riddell v. California Portland Cement Co.*, 330 F.2d 16, 17-18 (9th Cir. 1964), specifically stated that the government conceded that the blending of additives was a pre-kiln process and that the expense thereof is a mining cost.

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[7] § 613(c)(2): "The term 'mining' includes not merely the extraction of the ores or minerals from the ground but also the treatment processes considered as mining described in paragraph (4) (and the treatment processes *necessary or incidental* thereto) . . . ." (Emphasis added.)

CONCLUSION

This case does not create a conflict among the Circuits of important questions of law, nor, because of the unique factual issues involved, would it provide a decision of substantial importance in the administration of the federal revenue laws. Consequently, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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